STATE OF MICHIGAN

COURT OF APPEALS

DIANE MARIE AARDEMA,

Plaintiff-Appellee/Cross-Appellant,

v

WILLIAM EDWARD AARDEMA,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 1, 2000

No. 222791
Kalamazoo Circuit Court
LC No. 98-003250-DM

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant William Edward Aardema appeals, and plaintiff Diane Marie Aardema cross-appeals, by right from a judgment of divorce. We affirm in part, reverse in part, and remand.

I. Basic Facts And Procedural History

Before the parties in this matter married in 1980, Diane Aardema had completed all but one semester of credits necessary to earn a master's degree. She earned the degree shortly after she married William Aardema. However, when the couple had the first of their two children, William Aardema apparently pressured his wife to quit her job as a teacher in order to stay home with the children. Diane Aardema first took a leave of absence and then resigned from her teaching position; she stayed home with the children for ten years, during which time she was primarily responsible for taking care of them. She was in charge of taking care of their physical and medical needs, taking them to school, and was available to give the children emotional support. Diane Aardema returned to teaching three years before the trial in this case, when the eldest child was twelve and the youngest child was nine, earning approximately $34,000 a year.

William Aardema first worked for Diane Aardema's father in a glass business. In 1986, William Aardema purchased the glass business from his father-in-law and the other owners; this purchase was, apparently, for both him and his wife. He worked at the glass business from approximately six in the morning to six at night, but was involved with the children in the evenings and on weekends. William Aardema subsequently sold the glass business, netting approximately $33,500 in cash, but he agreed to pay the purchasers up to $12,000 for various accounts receivable owed to the company if the accounts

could not be collected. As part of the agreement to sell the business, William Aardema also agreed to stay an additional year for a salary of $60,000 plus a minimum guaranteed bonus of $10,000.

When the parties entered counseling with a psychologist in December 1997, Diane Aardema allegedly became aware that she had repressed memories of being sexually abused as a child. When she asked her husband to keep this information a secret, William Aardema agreed not to tell anyone about the abuse. Nevertheless, almost immediately, he told several people, including members of his family, a co-worker, and a friend, about her sexual victimization.

Diane Aardema filed for divorce on November 13, 1998. William Aardema vehemently opposed the divorce. At trial, Diane Aardema presented evidence that William Aardema exhibited anger, coerced her into engaging in unwanted sexual intercourse and, after she filed for divorce, accused her of being a lesbian and impeded her discovery efforts. William Aardema failed to dispute Diane Aardema's evidence that he had verbally threatened her repeatedly, at times in front of their children, alleging that she would be left with little if she continued with the divorce. He also agreed that he was more rule-oriented and structured than Diane Aardema; two experts testified that he was somewhat rigid and inflexible.

The parties generally agreed that they would each receive half of the marital property. Their primary asset was the marital home in Portage, which had a fair market value of $200,000, an outstanding mortgage of $83,000, and equity of $117,000. The parties decided that William Aardema would keep the marital home and pay Diane Aardema half of the house's equity within sixty days, because she had arranged to build a new house in the children's school district. Diane Aardema anticipated that her monthly payment on the new home would be just under $1,000 per month and requested child support, alimony of $1,250 per month for at least ten years, and substantial attorney fees. Each party requested physical custody of the children, but William Aardema was willing to share custody jointly.

The trial court awarded the parties joint legal custody of the children, but awarded Diane Aardema their sole physical custody. As part of the custody arrangement, the trial court granted William Aardema visitation on alternate weekends and every Wednesday evening during the school year, alternate holidays, birthdays and spring breaks, and five weeks of parenting time during the summer. The trial court ordered William Aardema to pay Diane Aardema child support in the amount of $237 per week until their oldest child graduates from high school, and then $153 per week until their youngest child graduates from high school. The amount of child support was subject to abatement if the children were with William Aardema for six or more consecutive nights. The trial court also awarded Diane Aardema spousal support of $163 a week for not less than five years, to be reviewed at that time. The trial court divided the marital property, including retirement accounts and the equity in the marital home, roughly in half. The trial court did not order William Aardema to pay Diane Aardema for her share of the family home as they had agreed; instead it ordered that William Aardema pay Diane Aardema $35,000 on or before August 1, 2001, and $23,500 on or before August 1, 2004. Additionally, the trial court ordered William Aardema to pay $13,320 of Diane Aardema's attorney fees, which was slightly more than sixty percent of the attorney fees she incurred.

II. Physical Custody

A. Preservation Of The Issue And Standard Of Review

William Aardema claims that the trial court erred in awarding sole physical custody of the parties' minor children to Diane Aardema. He preserved this issue for appeal by asking the trial court to award the parties joint physical custody. See generally *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999).

We apply a multifaceted standard of review to this issue. The trial court's custody order must be affirmed unless its findings were against the great weight of the evidence, it committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; MSA 25.312(8). The trial court's findings with regard to each factor affecting custody should be affirmed "unless the evidence clearly preponderates in the opposite direction . . . ." *Hilliard v Schmidt*, 231 Mich App 316, 321; 586 NW2d 263 (1998). This Court reviews the trial court's discretionary rulings, such as to whom it granted custody, for an abuse of discretion. *Id.*

B. The Best Interests Factors

Custody disputes must be resolved in the children's best interests, as measured by the factors set forth in MCL 722.23; MSA 25.312(3). William Aardema argues that, rather than finding in favor of Diane Aardema, the trial court should have found the parties to be equal on the following best interest factors: (1) the love, affection, and other emotional ties existing between the parties involved and the minor children; (2) the capacity and disposition of the parties to give the children love, affection, and guidance, and to continue educating and raising the children in their religion; (3) the capacity and disposition of the parties to provide the children with food, clothing, medical care, and other remedial care; (4) the length of time that the children lived in a stable, satisfactory environment, and the desire for maintaining continuity; and (5) the permanence, as a family unit, of the existing or proposed custodial home. MCL 722.23(a)-(e); MSA 25.312(3)(a)-(e).

Regarding the love, affection, and other emotional ties existing between the parties and the minor children, the trial court found that both parties love the children and that there are obvious emotional ties between each of them and the children. However, the trial court found that Diane Aardema prevailed on this factor because she was primarily responsible for preparing meals, the children spoke with her when they had a problem or a triumph, she spent the most time with the children, and they had a stronger bond. Although William Aardema does not dispute any of the trial court's finding on this factor, he contends that the trial court should have found that this factor favors both parties equally as did the court-appointed expert in this case. The trial court specifically disagreed with the expert's evaluation of the children and the factors he considered and we conclude that the evidence did not clearly preponderate against the trial court's finding.

Regarding the capacity and disposition of the parties to give the children love, affection, and guidance, and to continue educating and raising the children in their religion, the trial court again found in favor of Diane Aardema. The trial court noted that both parties were very religious and that both had a

significant effect on their children's religious training. However, the trial court found that Diane Aardema prevailed on this factor because she bathed and dressed the children, stayed home when they were sick, and was most involved in their academic achievements or extracurricular activities. William Aardema does not dispute the trial court's factual findings on the love, affection, and guidance aspects to this factor. Rather, he claims that he was the primary influence in the children's religious life, that Diane Aardema "was not as adamant about the importance it [religion] plays in the children's lives," and that the trial court should have concluded that this factor favored each party equally. The record, however, reveals that Diane Aardema was a deacon in the family's church for three years, that she worked in the church nursery when the children were young, that she organized and ran the vacation bible school for seven years, that she took the children to a bible study program for five years, that she taught classes in the church, and that she was involved in selecting the youth director for the church. Furthermore, at trial, Diane Aardema testified that the children were very active in the church and that she hoped that they would continue to be involved. We conclude that the evidence does not clearly preponderate against the trial court's finding that Diane Aardema prevailed on this factor.

William Aardema next claims that the trial court should have considered the parties equal regarding their capacity and disposition to provide the children with food, clothing, medical care and other remedial care because both parties have the capacity to earn a respectable living and to meet the children's physical needs. The trial court found this factor to favor Diane Aardema slightly. The trial court recognized that William Aardema has a greater earning capacity. However, the trial court found that Diane Aardema's income is more certain in the future, has more opportunity to attend classes for professional improvement, and has a greater ability to provide insurance for the children. William Aardema does not dispute these findings. The evidence was clear that, apart from both parties' *capacity* to provide the children with food, clothing and medical care, Diane Aardema was more *disposed* to meet these needs of the children. We conclude that the evidence does not clearly preponderate against the trial court's finding slightly in favor of Diane Aardema on this factor.

The trial court also found that both parties provided a safe environment and perhaps both could provide continuity, but that while the divorce was pending, Diane Aardema demonstrated the ability and capacity to meet the children's emotional needs and to provide them with a sense of stability and security. William Aardema asserts that the trial court should have found the parties equal regarding the length of time that the children lived in a stable, satisfactory environment, and the desirability of maintaining continuity. He argues that the trial court erred in focusing on events that occurred while the divorce was pending and should have considered the environment before the divorce proceedings. Although the trial court may have referred to the "very tough time" the parties, and the family as a whole, experienced while the divorce was pending, this was merely an example of Diane Aardema's capacity to meet the children's emotional needs and to provide them security during a time when they would need it the most. We conclude that the evidence did not clearly preponderate against the trial court's findings on this factor.

Finally, William Aardema takes issue with the trial court's finding in favor of Diane Aardema on the factor of the permanence as a family unit of the existing or proposed custodial home. He argues that the trial court should have found in favor of him, or at least found the parties to be equal on this factor,

because he, not Diane Aardema, retained the marital home. The trial court found that the family unit has continued and, although it did not expressly find in favor of Diane Aardema on this factor, the trial court noted that regardless of whether William Aardema was a part of that family unit, Diane Aardema had been with the children for a significant period of time. Further, according to the trial court, she would continue to be with the children as their primary caregiver at her new residence. Diane Aardema is correct that this factor focuses on the family as a unit, and not the physical structure within which the family unit resides. We can find no flaw in the trial court's findings on this factor. Diane Aardema had been the children's primary caregiver for the ten years when she stayed at home with them. She continued to be their primary caregiver during the three years before trial, even though she had returned to teaching, and had arranged to have a new home built in the same school district the children were attending. We conclude that the evidence does not clearly preponderate against the trial court's findings on this factor.

Overall, therefore, we conclude that the evidence in this case does not clearly preponderate against the trial court's findings on the factors at issue and the trial court did not abuse its discretion in granting Diane Aardema physical custody of the minor children. Accordingly, we affirm the trial court's custody decision.

III. The MNB Cash Account

A. Preservation Of The Issue And Standard Of Review

William Aardema argues that the trial court erred in deciding how to divide the parties' Michigan National Bank (MNB) cash account, which had approximately $31,500 in it. The parties raised this issue in the trial court, thereby preserving it for appeal. *Kosch*, *supra*.

A trial court's dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

B. Distribution

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all of the circumstances. *Sparks*, *supra* at 159. The division need not be mathematically equal. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999).

The parties do not contest the trial court's conclusion that each one was entitled to half the marital assets. Presumably the MNB cash account, which held the $31,500 in proceeds from the sale of the glass business, was a marital asset and each party was to share it equally. Neither party disputed that they jointly owed up to $12,000 for unpaid accounts receivable from the glass business. William Aardema indisputably used $2,000 of marital funds to pay his attorneys a retainer, so the parties agreed that, on paper, $2,000 would be added back into the cash account for the purpose of dividing it. The money in the MNB cash account would then total $33,500. The trial court considered the offsets and divided the cash account as follows:

$31,500	MNB cash account
+ 2,000	Attorney fees withdrawn from marital funds by William Aardema
$33,500	
- 12,000	Maximum accounts receivable liability for glass business
$21,500	Total cash funds immediately available for distribution
÷ 2	Divided between the two parties
$10,750	Equal distribution of cash funds to each party (+ any funds added back from the glass business & then divided in half)

The trial court considered the potential accounts receivable obligation that the parties apparently owed jointly to the individuals who purchased the glass business when dividing this account. If the glass company's new owners did not collect any off the accounts receivable, the $12,000 put into escrow would be paid to the purchasers and neither Diane Aardema nor William Aardema would receive any portion of that $12,000. However, to the extent that the new owners were able to collect the accounts receivable, the parties' joint liability would be reduced by those amounts increasing the actual amount they would receive. Any money remaining in the escrow account would be divided between them equally.

The trial court gave William Aardema two options for repaying the loan against his 401(k) account so that he could choose the repayment method with the most beneficial tax consequences. These choices involved the MNB cash account. In the first option, the parties would divide the 401(k) without discharging the loan so that they would share the assets and the debt on the 401(k) account equally and then they could simply split the cash in the MNB cash account in half, each receiving roughly $10,750 in cash. In the second option, William Aardema would pay the loan against the 401(k) account out of the cash in the MNB cash account, pay $10,750 to Diane Aardema, and then split the any additional cash that flowed into the MNB cash account from the new glass business owners. The flaw with this second method is that it assumes that, having repaid the loan from the MNB cash account, there will still be $21,500 to divide equally between the parties. Rather, as William Aardema's calculations show, by paying off the 401(k) loan rather than having the parties each shoulder half the debt, there will be less cash to divide:

$31,500	MNB cash account
+ 2,000	Attorney fees withdrawn from marital funds by William Aardema
$33,500	
- 12,000	Maximum accounts receivable liability for glass business

$21,500	Total cash funds available to pay 401(k) loan
- 17,000	401(k) loan repayment
$4,500	Remaining cash in the MNB cash account
÷ 2	Divided between the two parties
$2,250	Equal distribution between the parties (+ any additional funds added back from the glass business and then divided in half)

If William Aardema selected this second method and paid Diane Aardema $10,750, she would receive approximately $8,500 more than he would receive. As far as we can tell from the divorce judgment's wording and structure, the trial court did not intend to award Diane Aardema a greater share of this account and, although this mistake is both simple and understandable, we conclude that the trial court clearly erred in this division. Accordingly, we remand so that the trial court can correct this mathematical error and hold an evidentiary hearing if necessary. We affirm the remaining division of marital assets.

IV. Attorney Fees

William Aardema asserts that the trial court erred in awarding attorney fees to Diane Aardema. Although he objected in writing to entering the judgment of divorce, including any award of attorney fees to Diane Aardema, he later withdrew his objection to an award encompassing attorney fees. Therefore, this issue is not preserved for appeal and we do not address it. See *People v Burgess*, 153 Mich App 715, 724; 3496 NW2d 814 (1986).

V. Spousal Support

A. Preservation Of The Issue And Standard Of Review

William Aardema contends that the trial court erred in awarding spousal support to Diane Aardema. Because he raised this issue at trial, this issue is preserved for appeal. *Kosch*, *supra* at 353-354.

We review a trial court's factual findings for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A trial court's dispositional ruling regarding alimony is discretionary and should be affirmed unless this Court is left with the firm conviction that it was inequitable. *Sparks*, *supra* at 152.

B. The Standard Factors

In *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996), this Court explained:

> A divorce court has the discretion to award alimony as it considers just and reasonable. Relevant factors for the court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. [Citations omitted.]

The trial court considered each of these standard factors in reaching its conclusion on this issue, of which fault was but one factor. See, e.g., *Sparks*, *supra* at 158-163.

Although William Aardema contends that the trial court erroneously found him at fault in the breakdown of the marriage, the trial court's finding is presumptively correct and he has the burden of showing clear error. *Beason*, *supra* at 804-805. William Aardema has not carried this burden because he does not dispute that he engaged in the conduct the trial court cited as the basis for its finding of fault. Even assuming that William Aardema did not act with the "intent" to harm Diane Aardema and that part of the reason he may have engaged in misconduct was to "save" the marriage, the conduct "was highly detrimental, regardless of the reasons behind it." *Welling*, *supra* at 711. Thus, the trial court did not clearly err in finding that William Aardema was more at fault than Diane Aardema for the breakdown of the marital relationship.

When awarding alimony to Diane Aardema, the trial court appropriately attempted to balance the incomes and needs of the parties in a way that would not impoverish either party. *Magee*, *supra*. The trial court recognized that Diane Aardema's current income, $34,000, was less than half of William Aardema's current income, a minimum of $70,000, and that the parties had enjoyed a good standard of living, which Diane Aardema could not continue on her salary alone. The trial court also acknowledged that Diane Aardema was capable of working during the summer, but that alimony for a period of at least five years was appropriate because she had made a significant contribution to the family by removing herself from the workforce and staying home with the children. Temporary spousal support was appropriate in this case because it would help Diane Aardema close the gap between what she was earning and what she could have been earning had she continued teaching. No evidence supported William Aardema's claim that Diane Aardema could have negotiated a higher starting salary when she reentered her profession. The temporary alimony award to Diane Aardema was fair and equitable under the facts of this case.

VI. The Cross-Appeal

A. Preservation Of The Issue And Standard Of Review

In her cross-appeal, Diane Aardema asserts that, in accordance with the parties' agreement, the trial court should have ordered William Aardema to refinance the marital home in order to pay her portion of the home's equity within sixty days. She argues that if William Aardema was unable to refinance the home, the trial court should have ordered him to sell the marital home to pay her portion of the equity. Diane Aardema argues alternatively that, because she may not receive her portion of the

equity in the marital residence for up to five years, the trial court should have awarded her interest on her share of the equity.

Diane Aardema argued in the trial court that William Aardema should be forced to pay her her equity interest in the marital home. However, she failed to raise the interest issue at all. Therefore, we address only the time-frame issue, because it is the only one preserved for appeal. *Kosch*, *supra*.

We review the trial court's factual findings for clear error. *Beason*, *supra* at 805. The trial court's dispositional ruling is discretionary and "should be affirmed unless the appellate court is left with the firm conviction that [the court's ruling] was inequitable." *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993), quoting *Sparks*, *supra* at 152.

B. Immediate Division

A judgment of divorce that provides neither an immediate division of assets nor interest may be inequitable. See *McDermott v McDermott*, 84 Mich App 39, 41; 269 NW2d 299 (1978). However, to paraphrase this Court's opinion in *Reigle v Reigle*, 189 Mich App 386, 394; 474 NW2d 297 (1991), in a divorce action, a trial court does not compensate a party for loss, but instead seeks an equitable distribution of property. Accordingly, awarding interest in a divorce action is not intended to compensate a party for losing the use of funds. *Id.*

The trial court achieved the primary goals of fashioning an equitable distribution of the property and balancing the income and needs of the parties. *Sparks*, *supra* at 159-160. Pursuant to the judgment of divorce, Diane Aardema would receive approximately sixty percent ($35,000) of her share of the equity in the marital home within two years and receive the remaining forty percent ($23,500) within five years. During that time, she would presumably remain employed as a teacher, receive combined child and spousal support of $400 per week, and receive at least $10,750 of the parties' cash account or an increased share in the 401K to offset any debt repaid from the MNB cash account. Although the trial court did not explain its reason for not awarding interest, the record suggests that the trial court was concerned with imposing unnecessary financial hardship on William Aardema. Nevertheless, the trial court did not foreclose forcing him to pay interest under all circumstances; if William Aardema does not pay Diane Aardema as ordered in the judgment of divorce, she certainly can then ask the trial court to impose interest on the money he owes her under the judgment or move for other equitable relief.

Affirmed in all respects except for the division of the MNB cash account. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck